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## **Assessing Criminal Justice Practice Using Social Justice Theory**

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### **ABSTRACT**

In this paper, I introduce two of the leading theories of social justice put forth by John Rawls and David Miller. Then, I assess criminal justice practice, from law-making to corrections, in terms of ways in which it is consistent and inconsistent with these theories of social justice. Throughout the paper, I also identify ways in which criminal justice practice is inconsistent with social justice. I make recommendations for reforming criminal justice to make it more consistent with social justice.

### **ARTICLE**

#### **Realizing Socially Just Criminal Justice Agencies**

### **INTRODUCTION**

Criminal justice agencies have been facing serious criticisms from scholars in criminal justice, criminology and related disciplines. One main claim is that criminal justice agencies are ineffective at meeting their goals, especially achieving justice (Robinson, 2009). Others say the “criminal justice system” may actually be aimed at controlling certain segments of the

population – the dangerous classes – in order to serve ideological interests of the powerful (Reiman, 2006; Shelden, 2007).

Whatever the case, few would argue with the point that there are major inconsistencies between criminal justice practice and efforts to bring about social justice (Arrigo, 1998). “Social justice” is generally equated with the notion of equality or equal opportunity in society.

Although equality is undeniably part of social justice, the meaning of social justice is actually much broader (Scherlen and Robinson, 2008). Further, “equal opportunity” and similar phrases such as “personal responsibility” have been used to diminish the prospective for realizing social justice by justifying enormous inequalities in modern society (Berry, 2005). The most recent theories of, and scholarly statements about, social justice illustrate the complex nature of the concept.

Two of the most prominent statements about social justice, each of which posits its own theory of social justice, are John Rawls’ (2003) *Justice as Fairness* and David Miller’s (2003) *Principles of Social Justice*. Both conceptions of social justice are similar, so there is significant overlap between the main ideas of the theorists; this is likely due to the fact that they are founded on like principles and based on previously posited theories from significant historical political philosophers (Brighthouse, 2005).

In this paper, I thoroughly summarize the social justice theories of John Rawls and David Miller. Then, I utilize the two theories to assess the current state of criminal justice practice as it relates to social justice. One goal of the paper is to show how America’s “criminal justice system” is both consistent and inconsistent with these theories of social justice – i.e., how criminal justice helps bring about but also interferes with the realization of social justice.

Another goal is to make suggestions to make criminal justice practice more consistent with social justice as laid out in the theories of Rawls and Miller.

My effort is not the first to examine criminal justice practice for the presence of biases based on extra-legal factors such as race, social class and so forth; many of the problems with criminal justice identified in this paper have been documented elsewhere (e.g., see Omi, 1994; Sidanius and Pratto, 2001). The main contribution of this paper is I specifically show how these problems in criminal justice threaten the realization of social justice, at least as social justice has been characterized by John Rawls and David Miller.

## JOHN RAWLS

### Goal and Assumptions

John Rawls posits a theory of social justice commonly referred to as “justice as fairness.” Rawls (2003: 5-6) set out to sketch a theory of social justice that would answer the questions: “once we view a democratic society as a fair system of social cooperation between citizens regarded as free and equal, what principles are most appropriate to it?” and “...which principles are most appropriate for a democratic society that not only professes but wants to take seriously ... that citizens are free and equal, and tries to realize that idea in its main institutions?”

Rawls develops his theory for a democratic system of government, and he assumes that society is composed of a fair system of social cooperation between free and equal citizens. He also assumes that society is well-organized and regulated by a public perception of justice. Further, he assumes that society is guided by rules and procedures that are publicly recognized and agreed to, that the rules specify fair terms of cooperation and are rooted in the notion of reciprocity or mutuality so that each person has a chance to promote his or her own advantage or good. Thus, his theory is aimed at determining the “political conception of justice for specifying

the fair terms of cooperation between citizens regarded as fair and equal and as both reasonable and rational ... (Rawls, 2003: 7-8).

Rawls' conception of social justice is developed around the idea of a social contract, whereby people freely enter into an agreement to follow certain rules for the betterment of everyone, without considering the implications of these rules for their own selfish gain. Rawls posits that rational, free people will agree to play by the rules under fair conditions and that this agreement is necessary to assure social justice because public support is critical to the acceptance of the rules of the game. These rules or principles "specify the basic rights and duties to be assigned by the main political and social institutions, and they regulate the division of benefits arising from social cooperation and allot the burdens necessary to sustain it" (Rawls, 2003: 7). Thus, social justice is about the advantages and disadvantages of society and how they should be distributed. This also is asserted by David Miller (2003), whose theory of social justice is reviewed later in the paper.

Rawls does not suggest that everyone will agree with what justice specifically requires in given situations, but rather that his conception of justice as fairness can fit into "conflicting doctrines" because of what he calls "overlapping consensus." That is, people agree enough about the basic principles of justice he offers that even when they disagree about larger moral, religious or philosophical issues they can still agree about issues of social justice (Rawls, 2003: 32-37).

Finally, Rawls does not posit an unrealistically utopian vision of what is justice but instead offers a theory of social justice that is "realistically utopian" (Rawls, 2003: 4). Rawls attempts to answer "[w]hat would a just democratic society be like under reasonably favorable

by still possible historical conditions, conditions allowed by the laws and tendencies of the social world?”

### What is Social Justice?

To Rawls, social justice is about assuring the protection of equal access to liberties, rights, and opportunities, as well as taking care of the least advantaged members of society. Thus, whether something is consistent with social justice depends on whether it promotes or hinders equality of access to civil liberties, human rights, opportunities for healthy and fulfilling lives, as well as whether it allocates a fair share of benefits to the least advantaged members of society.

Rawls’ theory of “justice as fairness” can be summarized with three primary principles. They are:

- 1) Each person has the same indefensible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all<sup>1</sup>;
- 2) Social and economic inequalities are to satisfy two conditions: First, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity<sup>2</sup>; and
- 3) Second, they are to be to the greatest benefit of the least-advantaged members of society<sup>3</sup> (Rawls, 2003: 42-43).

By the least advantaged, Rawls is referring to those who lack what he calls “primary goods” (Rawls, 2003: 53). Primary goods, according to Rawls, include “things needed and required by persons seen in the light of the political conception of persons, as citizens who are

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<sup>1</sup> This can be called the “equal liberties principle.”

<sup>2</sup> This can be called the “equal opportunity principle.”

<sup>3</sup> Rawls calls this the “difference principle.”

fully cooperating members of society, and not merely as human beings apart from any normative conception. These goods are things citizens need as free and equal persons living a complete life; they are not things it is simply rational to want or desire, or to prefer or even to crave” (Rawls, 2003: 58). Such goods include:

- The basic rights and liberties: freedom of thought and liberty of conscience, and the rest;
- Freedom of movement and free choice of occupation against a background of diverse opportunities, which opportunities allow the pursuit of a variety of ends and give effect to decisions to revise and alter them;
- Powers and prerogatives of office and position of authority and responsibility;
- Income and wealth, understood as all-purpose means (having an exchange value) generally needed to achieve a wide range of ends whatever they may be; and
- The social bases of self-respect, understood as those aspects of basic institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence (Rawls, 2003: 58-59).

It should be noted that Rawls (2003: 13) acknowledges the importance of “human rights” as well. He writes: “A just world order is perhaps best seen as a society of peoples, each people maintaining a well-ordered and decent political (domestic) regime, not necessarily democratic but fully respecting basic human rights.” Human rights are expansive and include many rights relevant to criminal justice including but not limited to the rights to life; liberty; security; equality before the law; fair and public hearings by independent and impartial tribunals; presumption of innocence until proven guilty; freedom of peaceful assembly and association; the right to participate in government; freedom from slavery, servitude, torture or cruel, inhuman or

degrading treatment or punishment; discrimination; arbitrary arrest, detention, or exile; arbitrary interference with privacy; among many others.<sup>4</sup>

To Rawls, liberty is the most important element of social justice because the three principles are ordered in terms of importance; this means the first principle (the “equal liberties principle”) should be achieved before efforts to achieve the second principle (the “equal opportunity principle”) and third principle (the “difference principle”) are attempted. The second and third principles should “always to be applied within a setting of background institutions that satisfy the requirements of the first principle (including the requirement of securing the fair value of the political liberties) ...” (Rawls, 2003: 46). Background institutions refer to basic structures of society (e.g., family, school, religion, economy, polity), which, when just, can be referred to as “background justice” (Rawls, 2003: 10). Logically, agencies of criminal justice are included in these societal institutions.

#### The Scope of the Principles

Not only can Rawls’ first principle be differentiated from the second in terms of priority or importance, each also has its own scope. That is, each is meant to have its own unique applications. According to Rawls, the first principle applies to the “constitutional essentials” whereas the second applies to “the background institutions of social and economic justice in the form most appropriate to citizens seen as free and equal” (Rawls, 2003: 47-48).

Rawls explains that the principles of justice as fairness are adopted and applied in a four-stage sequence. The first is the adoption of the principles of justice to regulate a society. Rawls (2003: 15) asserts that these must be adopted behind a “veil of ignorance,” which exists when

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<sup>4</sup> For other examples, see the Universal Declaration of Human Rights, Covenant on Civil and Political Rights, Covenant on Economic, Social, and Cultural Rights, and other similar documents. “A Summary of Agreements on Human Rights.” Retrieved from <http://www.hrweb.org/legal/undocs.html>

there is a limit on information because “parties are not allowed to know the social positions or the particular comprehensive doctrines of the people they represent. They also do not know persons’ race and ethnic group, sex, or various native endowments such as strength and intelligence, all within the normal range.”<sup>5</sup>

The second phase is the constitutional convention, which sets forth the institutions and basic processes of governance. The third stage is the legislative stage, where just laws are enacted. Finally, the fourth stage is the application of the rules by administrators, the interpretation of the constitution and laws by the judiciary, and the following of the rules by members of society in the conditions required by justice as fairness.

## DAVID MILLER

### Goal and Assumptions

David Miller posits a pluralistic and circumstantial theory of social justice that is built around those principles of justice that people actually hold. Miller (2003) develops his theory for a democratic system of government, and he assumes that society is a living organism composed of individuals, groups, and so forth who believe in social justice because it specifies the institutional arrangements that allow for full contributions by and well-being of members of the society. Further, his theory assumes a bounded society with members; that there are specific institutions to which the principles of social justice apply; and that the state is the agency capable of changing structures when necessary. The theory can be considered *pluralistic* or *circumstantial* because different parts of his conception of social justice are more or less relevant depending on the circumstances. That is, social justice depends on the context of given situations.

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<sup>5</sup> Criminal justice scholars often refer to “blind justice” when discussing how factors such as race, ethnicity, gender, social class, and other extra legal factors should not impact outcomes of justice (Robinson, 2009).



Millers' goal was to discover those principles people actually use when judging whether parts of society are just or unjust. Miller created his theory from public opinion polls and studies of public opinion with regard to different elements of justice. He does this in part because, while social justice must be "critical" in nature so that changes toward more fairness in society can be achieved, it must not be utopian. That is, it must be supported by citizens and can realistically be achieved; this is something with which John Rawls agreed.

It is important to note that Miller finds that people's views of justice are actually pluralistic in that they are determined by the context of a situation. This suggests that whether something is judged as just or unjust depends not only on the principles of justice that people hold but also in part on the nature of the situation.

#### What is Social Justice?

To Miller, social justice deals with the distribution of good (*advantages*) and bad (*disadvantages*) in society, and more specifically with how these things should be distributed within society. Further, social justice is concerned with the ways that resources are allocated to people by social institutions. Some of the advantages relevant for social justice include money, property, jobs, education, medical care, child care, care for the elderly, honors and prizes, personal security, housing, transportation, and opportunities for leisure. Some of the disadvantages include military service, dangerous work, and other hardships. Logically, punishment for wrongdoing would also be considered a disadvantage. Keep in mind that Miller's theory applies to both *public goods* as well as *private commodities*.

Whether something is just or unjust thus depends on whether advantages and disadvantages are distributed appropriately in society. Miller (2003: 1) explains that when "we attack some policy or some state of affairs as socially unjust, we are claiming that a person, or

more usually a category of persons, enjoys fewer advantages than that person or group of persons ought to enjoy (or bears more of the burdens than they ought to bear), given how other members of the society in question are fairing.”

Miller clearly points out that, when considering policies to allocate advantages and disadvantages, we must not judge them based on how they benefit us personally: “Justice is about assigning benefits whose values are established by their worth to the relevant population taken as a whole, and it must be *blind to personal preferences* (Miller, 2003: 8, emphasis added). Further, Miller (2003: 22) says that “justice fundamentally requires us to treat people as equals; or we should understand justice as what people would agree to in advance of knowing their own stake in the decision to be reached.”<sup>6</sup> Social justice efforts can not merely be rationalizations of self-interest; this is another concept agreed to by John Rawls.

To Miller, social justice is a social virtue that pertains to what you are due or owed, as well as what you owe others. It requires that everyone agrees to treat others as equals in a manner that is not egocentric or selfish. This does not mean that everyone has to agree on all procedures to bring about justice, for people generally agree on what justice demands (this is called the *stability of justice*).

Miller’s theory focuses on the concepts of need, desert, and equality. *Need* is a claim that one is lacking in basic necessities and is being harmed or is in danger of being harmed and/or that one’s capacity to function is being impeded (Miller, 2003: 207, 210). *Desert* is a claim that one has earned reward based on performance, that superior performance should attract superior recognition (Miller, 2003: 134, 141). *Equality* refers to the social ideal that society regards and

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<sup>6</sup> This is similar to Rawls’ claim about the “veil of ignorance” and reminds us of the need in criminal justice practice for “blind justice.”

treats its citizens as equals, and that benefits such as certain rights should be distributed equally (Miller, 2003: 232).

### Modes of Human Relationships

Miller's (2003: 25) theory asserts that whether need, desert, or equality takes precedence depends on which "mode of human relationship" is being considered. This is because "we can best understand which demands of justice someone can make of us by looking first at the particular nature of relationship." A *mode of human relationship* refers to the different kinds of relationships that people have with one another.

Miller specifies three basic modes of human relationships, including the solidaristic community, instrumental associations, and citizenship. A *solidaristic community* "exists when people share a common identity as members of a relatively stable group with a common ethos" (e.g., family relations). In this mode of human relationship, the principle of distribution according to need is most relevant: "Each member is expected to contribute to relieving the needs of others in proportion to ability, the extent of liability depending upon how close the ties of community are in each case ... Needs will be understood in terms of the general ethos of the community. Each community embodies, implicitly or explicitly, a sense of the standards that an adequate human life must meet, and it is in terms of this benchmark that the much-contested distinction between needs, which are matters of justice, and mere wants is drawn" (Miller, 2003: 27). Miller is clear to differentiate needs (meeting what is minimally necessary to avoid harm) versus wants or preferences. Needs are also held to be community-specific rather than individual-specific and thus can vary across places.

*Instrumental associations* exist when "people relate to one another in a utilitarian manner; each has aims and purposes that can best be realized by collaboration with others" (e.g.,

economic relations). In this mode of human relationship, the principle of distribution according to desert is most relevant: “Each person comes to the association as a free agent with a set of skills and talents that he deploys to advance its goals. Justice is done when he receives back by way of reward an equivalent to the contribution he makes. A person’s deserts, in other words, are fixed by the aims and purposes of the association to which she belongs; these provide the measuring rod in terms of which relative contributions can be judged” (Miller, 2003: 28). Desert is measured based on actual performance rather than efforts or attributes. It assumes that superior performance (not superior talents) should attract superior reward. Desert lies at the heart of a meritocratic system.

Finally, *citizenship* refers to “members of a political society” in “modern liberal democracies” who “are related not just through their communities and their instrumental associations but also as fellow citizens. Anyone who is a full member of such a society is understood to be the bearer of a set of rights and obligations that together define the status of citizen.” In this mode of human relationship, the principle of distribution according to equality is most relevant because everyone in the society is deemed equal in terms of certain rights (Miller, 2003: 30). Here, every citizen deserves equal rights.

Because of the citizenship mode, human rights play a significant role in Miller’s theory of social justice. Miller (2003:13) explains that “a central element in any theory of justice will be an account of the basic rights of citizens, which will include rights to various concrete liberties, such as freedom of movement and freedom of speech ... an extensive sphere of basic liberty is built into the requirements of social justice itself.” As introduced earlier, human rights are expansive and include rights in many areas.

## SUMMARY OF AND OVERLAP IN RAWLS' AND MILLER'S THEORIES OF SOCIAL JUSTICE

To summarize the theories, each social justice theorist posits three major principles. John Rawls' principles assert: 1) Every person should have the same liberties; 2) Inequalities are acceptable if every person has the same opportunity for success; and 3) Inequalities are acceptable if they are arranged to the greatest benefit of the least-advantaged members of society. David Miller's principles assert that: 1) Every person's basic needs should be met and not hindered; 2) Every person should enjoy benefits and carry burdens to the degree he or she deserves them; and 3) Each person should be treated equally.

There is obviously significant overlap in the theories of Rawls and Millers. For example, Rawls' equal liberties principle is most similar to Miller's principle of equality (every citizen deserves the same basic civil liberties and no societal practices should interfere with these rights). Rawls' difference principle is most similar to Miller's principle of need (arrangements in society should take care of the basic needs of all people in society and no societal practices should interfere with these needs). And Rawls' equal opportunity principle is most similar to Miller's principle of desert (every citizen should have the same opportunity to compete for reward based on performance and societal practices should be set up to assure this outcome). As noted earlier, the overlap in the theories is likely due to the fact that both theories are founded on like principles and based on previously posited theories from significant historical political philosophers.

Finally, recall that each principle has its own scope. For example, according to Rawls, the equal liberties principle applies to the establishment of "constitutional essentials." Thus, the equal liberties principle can be used to assess if citizens enjoy equal liberties according to the

law. Rawls' other principles apply to the main institutions of society, which would include the law, policing, courts, and corrections. As such, the equal opportunity and difference principles apply to the interpretation and application of the law by important societal institutions, including the police, courts, and corrections.

Similarly, according to Miller, each principle is more or less relevant depending on the mode of human relationship being considered. In matters of citizenship, the principle of equality is most important. Following this logic, as citizens in the United States, all of us should be treated equally in the eyes of the law (and in its application by agencies of criminal justice).

As for the principle of need, this is most relevant for solidaristic communities such as families. However, it is not irrelevant for criminal justice for at least three reasons. First, to the degree that all citizens of a society see themselves as members of an extended family – e.g., an “American family” – where all members are “in this together,” need becomes even more important. Second, to the degree that criminality is driven by efforts to satisfy basic needs (e.g., stealing food to eat), need becomes relevant since punishing people for trying to satisfy basic needs will logically interfere with the ability of people to satisfy their basic needs (Little and Steinberg, 2006). Third, criminal justice processing can interfere with the basic needs of citizens as well, especially minorities and the poor (Lurigio and Loose, 2008).

As for the principle of desert, this is most relevant for instrumental associations such as work. However, it is also not irrelevant for criminal justice for at least three reasons. First, many criminological theories assert that criminality is driven by a desire to seek monetary gain; these crimes are even referred to as “instrumental crimes” (Baumer and Gustafson, 2007). Second, if people cannot obtain wealth and their other goals through legal means, some will turn to criminality through “innovation” (Merton, 1938). To whatever degree people innovate because

of diminished opportunities for legitimate success, criminal justice processing may be less deserved because of “mitigating” factors such as poverty and unemployment (Ashworth, 1994). Third, it is well accepted among legal scholars that punishment is aimed at satisfying desert; that is, giving offenders what they deserve (Ristroph, 2006).

### HOW TO USE THE THEORIES

For the above reasons, it is entirely appropriate to use the theories of John Rawls and David Miller to assess the performance of government institutions, including the law, policing, courts, and corrections. We can use Rawls’ theory of “justice as fairness” to determine if any institution, process or outcome in society is consistent with social justice. When an institution, process or outcome does not comport with any of Rawls’ principles, we can conclude that it is not consistent with social justice. That is, something is not consistent with Rawls’ conception of social justice if it interferes with any person’s indefensible claims to equal basic liberties (the “equal liberties principle”); or if inequalities in society are not attached to offices and positions open to all under conditions of fair equality of opportunity (the “equal opportunity principle”); or if inequalities in society are not arranged to the greatest benefit of the least-advantaged members of society (the “difference principle”).

Similarly, we can use Miller’s pluralistic theory of social justice to determine if any institution, process or outcome in society is consistent with social justice. When an institution, process or outcome does not comport with any of Millers’ principles, we can conclude that it is not consistent with social justice. That is, something is not consistent with Miller’s conception of social justice if it interferes with one’s necessities or hurts one’s capacity to function, if it interferes with claims based on desert, or if it impedes equal opportunity or treatment.

These theories can be used to assess any government policy to determine if it is consistent or inconsistent with this theory of social justice. Thus, any criminal justice policy – from law-making to policing, judicial processes, correctional punishments, and so forth – can be judged as consistent or inconsistent with social justice based on whether it is consistent or inconsistent with Rawls’ and Miller’s principles of social justice. This paper is the first to assess criminal justice practice using these theories of social justice.

#### HOW DOES CRIMINAL JUSTICE HELP REALIZE AND INTERFERE WITH SOCIAL JUSTICE?

Table 1 identifies key policies, laws, and programs within criminal justice that are consistent with the theories of social justice put forth by John Rawls and David Miller. These are efforts that help bring about social justice in the real world. Each entry is discussed below.



**Table 1: How Criminal Justice is Consistent with Social Justice**

<b><u>LAW</u></b>	<b><u>POLICE</u></b>	<b><u>COURTS</u></b>	<b><u>CORRECTIONS</u></b>
Bill of Rights	L.E. Code of Conduct	Due process	Care, custody of inmates
due process	Rights protector	Adversarial system	Inmate classification
equal protection	Service provider	Indigent defense	Education, vocational training
		Sentencing guidelines	
Defines crimes	L.E. Code of Conduct		
public order	Law enforcement		
citizen protection	Crime prevention		
	Peace preserver		

Table 2 identifies key policies, laws, and programs within criminal justice that are inconsistent with the theories of social justice put forth by John Rawls and David Miller. These are efforts that hinder bring about social justice in the real world. Each entry is also discussed below.

**Table 2: How Criminal Justice is Not Consistent with Social Justice**

<b>LAW</b>	<b>POLICE</b>	<b>COURTS</b>	<b>CORRECTIONS</b>
Differential access voting	Enforce biased laws	Enforce biased laws	Enforce biased laws
lobbying	Abuse discretion	Unequal access to defense	Unequal application of sanctions/punishments
Do not define crimes based on harm	Differential arrest, force	Plea bargaining	
Criminalize need	Racial profiling	Determinate, mandatory sentencing	Limited access to satisfy needs
Biased laws			

A review of these tables leads to the overriding conclusion that the criminal law (e.g., the Bill of Rights in the US Constitution) was set up to protect civil liberties and to provide for equality, at least ideally. Further, American criminal justice agencies are ideally dedicated to outcomes consistent with social justice (e.g., due process and equal protection). Yet, the reality of criminal justice practice puts criminal justice at conflict with social justice in many ways. Below I discuss some of the ways that criminal justice practice is consistent and inconsistent with social justice as put forth in the theories of John Rawls and David Miller. I start with the law and then move on to police, courts, and corrections.

#### The Law

Starting with the Bill of Rights of the United States Constitution, the law establishes due process rights and equal protections for all citizens under the law (Orth, 2003). Thus, it can be seen as consistent with Rawls' "equal liberties principle" and Miller's principle of "equality." Recall that Rawls suggested that his first principle (the "equal liberties" principle) applies to the "constitutional essentials." The ideal of American criminal justice as found in the US Constitution appears on its face to be consistent with Rawls' first principle. Also recall that Miller's conception of equality is to be applied in matters of citizenship, suggesting that all members of a political society in modern liberal democracies be granted the same rights by law. The ideal of American criminal justice as found in the US Constitution thus appears to be consistent with Miller's equality principle.

However, it should be pointed out that historians, sociologists, and other scholars have interpreted the US Constitution differently. That have argued that the Constitution was not written behind a veil of ignorance (and was thus not "blind to personal preference," as Miller would say). This raises the possibility that the founders may have acted with their own personal interests in mind when they wrote the US Constitution.

For example, Charles Beard suggests that the construction of the Constitution was biased against the poor. For example, of the five economic groups that existed in 1787, when the document was drafted in Philadelphia, "the four poorest groups had no representatives at the convention: women, slaves, indentured servants, and propertyless white men" (Harrigan, 2000: 45). Every delegate involved in drafting the Constitution was a white male who owned enough property to be allowed to vote. According to Beard, of the 55 delegates, 38 owned government bonds, 24 earned their living through banking or some other financial investment, 15 owned slaves, and 14 had investments in western lands. Further, of the 55 delegates, "at least 40 percent

have been or are slave owners, and a significant proportion of the others profit to some degree as merchants, shippers, lawyers, and bankers from the trade in slaves, commerce in slave-produced agricultural products, or supplying provisions to slaveholders and slave-traders” (Feagin, 2001: 9).

Harrigan (2000: 47) suggests that three different types of provisions were written into the Constitution to protect the limited financial interests of wealthy, white male delegates:

- Those that protected their private property rights;
- Those that insulated the national government from popular rule; and
- Those that minimized the influence of the lower-status population in the ratification process.

The protections of private property rights included provisions that benefited businesses engaged in trade and economy, bankers and creditors, slave holders, and holders of securities under the Articles of Confederation.

Feagin (2000: 10) explains that:

At the heart of the Constitution was protection of the property and wealth of the affluent bourgeoisie in the new nation, including property of those enslaved ... For the founders, freedom meant the protection of unequal accumulation of property, particularly property that could produce a profit in the emerging capitalistic system. Certain political, economic, and racial interests were conjoined. This was not just a political gathering with the purpose of creating a new major bourgeois-democratic government; it was also a meeting to protect the racial and economic interests of men with substantial property and wealth in the colonies.

Popular rule was not set up in the Constitution because people did not directly vote for the president, the Court, or the Senate. Only House members were originally elected by the people, and people could vote only if their congressional districts had at least 30,000 people. This benefited the wealthy. Barriers to voting (such as property ownership requirements) were constructed to discourage a large percentage of people from voting. Because of this, Harrigan concludes:

The lower-status population did indeed have nothing to say about the drafting of the Constitution and (whether by choice or coercion) had little to say about ratifying it. Important provisions in the Constitution protected economic interests that were more valuable to the upper-status population than to the lower-status population (p. 53).

Similarly, Joe Feagin (2001), traces the roots of American racism to the U.S. Constitution and early Colonial America. He suggests that many of our country's founders, including Thomas Jefferson, Benjamin Franklin, and James Madison, were greatly influenced by assumptions in Europe about the inherent inferiority of African Americans to Caucasians. Thus, African Americans would specifically to be counted only as three-fifths of a man according to the Article I, Section 2 of the U.S. Constitution.

Feagin (2001: 14) asserts that the U.S. Constitutional Convention was something other than what we have learned about in school. He suggests the structure of the nation, as laid out in the Constitution, "was created to maintain separation and oppression at the time and for the foreseeable future. The framers reinforced and legitimated a system of racist oppression that they thought would ensure that whites, especially white men of means, would rule for centuries to come."

According to Feagin (2001: 15), the country's founders owned slaves and benefited from the unequal treatment of African Americans with Caucasians. "Men of politics like Thomas Jefferson, George Washington, Alexander Hamilton, Patrick Henry, Benjamin Franklin, John Hancock, and Sam Houston enslaved black Americans. Ten U.S. presidents (Washington, Jefferson, James Madison, James Monroe, Andrew Jackson, John Tyler, James Polk, Zachary Taylor, and Ulysses S. Grant) at some point in their lives enslaved African Americans." Many lawmakers (members of both houses of Congress) were also slave owners, as were those who would interpret the law (members of the U.S. Supreme Court). Not surprisingly, "few major decisions made by the federal legislative and judicial branches went against the interests of the nation's slaveholding oligarchy, and foreign and domestic policies generally did not conflict with the interests of those centrally involved with the slavery system" (p. 56).

To the degree that the claims of these scholars are accurate, then the U.S. Constitution was not written behind a "veil of ignorance" but rather was actually a rationalization of self-interest on the part of wealthy, large land holders and slave owners. This would make those parts of the U.S. Constitution that serve limited interests inconsistent with social justice.

The criminal law defines crimes to maintain public order and to protect citizens from harms (Davenport, 2008). Since government protection from willful harmful acts like crimes can be seen as a basic human right or need, this is consistent with Miller's principle of "need." To the degree that all citizens are viewed as a family, as noted earlier, this is especially important. Defining crimes to protect citizens and society is also consistent with Rawls' notion that "primary goods" should be available to all because primary goods include the right of people to live freely and safely.

However, from the very beginning of the criminal justice practice, there is differential access to law-making in the form of voting and lobbying activities (Lynch, Michalowski, and Groves, 2000). The poor and people of color are underrepresented among voters and legislators themselves and are also least likely to donate money to political campaigns (Robinson, 2009). This raises the significant possibility of bias in the criminal law, the outcome being that certain groups have their voices and interests represented more than others and that certain acts will be more and less likely to be criminalized not based on degree of harm caused but instead on other political and ideological grounds (Reiman, 2006). Differential access to the criminal law and criminalization of various harms based on differential access to the criminal law are outcomes that are inconsistent with Rawls' equal opportunities principle as well as Miller's equality principle. To be consistent with social justice, every citizen should have an equal chance to influence the criminal law and have his or her interests reflected in the criminalization process.

Further, it is obvious that the rules and procedures of criminal justice are not created behind a "veil of ignorance," raising a significant possibility that criminal justice practice is not blind to personal preferences and may thus be created as rationalizations of self-interest (McGarrell and Flanagan, 1987). In fact, all criminal justice policies are lobbied for and against by powerful interests. Groups behind current criminal justice policy are not necessarily motivated by concerns for social justice. One likely outcome of this reality is that many forms of harmful behaviors will not be legislated as crimes and targeted by criminal justice agencies, simply because of who commits them. In fact, although the criminal law is aimed at protecting people from harmful acts, those acts that pose the greatest threats to citizens (i.e., white-collar and corporate crimes) are the ones that are least likely to be legislated as crimes and especially as

serious crimes (Simon, 2007). Thus, the most dangerous criminals often do not get what they “deserve” (Robinson and Murphy, 2008). This is not consistent with Miller’s concept of desert.

To reiterate, since Miller’s concept of desert is most relevant for instrumental associations such as work, the application of desert to the criminalization process may not be viewed as all as entirely appropriate. However, it is well established that being labeled a “criminal” and suffering sanctions from governmental institutions such as the police, courts, and corrections will likely produce outcomes such as “felony disenfranchisement” that interfere with the ability of citizens to engage in instrumental associations such as work (Sennott and Galliher, 2006). Thus, forms of punishment such as incarceration can be seen as inconsistent with social justice to the degree that they interfere with one’s ability to engage in activities such as work that allow people to be rewarded for their contribution to society (Wheelock, 2005).

Simultaneously, relatively minor criminals often get far more than they “deserve” based on the harms caused by their behaviors (Meir and Geis, 1997). As one example, Robinson and Murphy (2008) demonstrate, using government data, that corporate and white-collar crime cost Americans at least 1 trillion dollars in direct losses every year, compared to only \$20 billion in losses cause by street crime. Yet, less than five percent of police officers are focused on the former, and about 99% of all people incarcerated in the United States are incarcerated for committing the latter. This is inconsistent with Miller’s concept of desert. The argument is that the “worst of the worst” offenders should be subjected to the “worst of the worst” criminal sanctions. In the United States, this is simply not the case.

Further, crimes of the poor (e.g., theft) are at times aimed at satisfying basic human “needs” (Agnew, 2005). Thus, the application of the law to stop such acts can be seen as interfering with social justice, at least when the means to achieve ones goals are blocked for



reasons such as discrimination, which itself is not consistent with social justice (Simons and Gray, 1989) . That is, if opportunities to succeed through legal means are not truly equally available to all (as they should be according to Rawls), and some people respond through “innovation” by creating new, illegitimate (i.e., criminal) means to achieve their goals (Merton, 1938), then we can see the labeling of some behaviors as crimes as the criminalization of efforts to meet needs.

In a nutshell, to the degree that the criminal law is aimed at the crimes committed disproportionately by the poor and people of color while it simultaneously ignores the harmful and culpable acts of the powerful (e.g., wealthy whites), it is unequal, undeserved, not focused on helping people achieve their basic needs, and clearly not aimed at providing the greatest advantage to the least advantaged. Thus, it violates Rawls’ and Miller’s conceptions of “need,” “equality,” “desert,” and the “difference principle.”

Further, since police, courts and corrections enforce the criminal law (through arrest, conviction, sentencing, and punishment), any bias in the criminal law will logically be perpetuated through enforcement of that law (Reiman, 2006; Robinson, 2009; Shelden, 2007). This is likely the greatest threat to social justice in criminal justice practice. As shown in Table 2, this threat to social justice (enforcing biased law) is found in policing, courts, and corrections.

### Policing

In policing, the Law Enforcement Code of Conduct specifies that one of the fundamental duties of police is to protect people’s rights, provide important services to the community, as well as enforce the law, prevent crime, and uphold the peace (International Association of Chiefs of Police, 2008). Since all of these which can be seen as “needs” of the community and basic rights of the people, the written functions or roles of police are consistent with Miller’s principle

of need and Rawls' conception of primary goods. Further, rights protection can be seen as a form of policing activity that is consistent with Rawls' "equal liberties" principle. One good example is at the point where arrest is imminent, police officers read suspects their rights to remain silent in order to protect their Fifth Amendment right against self-incrimination (Stuart, 2008).

Yet, since officers have discretion, it can be abused (Alpert, Dunham, and Stroshine, 2005). When it is, it leads to differential police outcomes. For example, poor people and people of color are disproportionately likely to be stopped, searched, arrested, and have force use against them (Walker, Spohn, and DeLone, 2007). They are also more likely to be victims of racial profiling (Withrow, 2005). These are outcomes that are inconsistent with Rawls' "equal liberties" as well as Miller's "equality principle." All citizens deserve to be treated the same by the police and other agents of government, unless their own actions lead them to "deserve" more attention. Racial profiling implies that certain groups in society are being targeted more based on extra-legal factors such as race rather than legal factors such as criminality (Miller, 2007).

Further, since criminal justice involvement can interfere with legitimate opportunities such as school and work, it can be seen as a threat to Rawls' "equal opportunities principle." And since differential involvement with police tends to harm the least advantaged (Shelden, 2007), it is inconsistent with Rawls' "difference principle." To be consistent with Rawls' difference principle, activities of government institutions such as law enforcement agencies should be arranged to assist the least advantaged not to hinder or hurt them.

Recall that historians have pointed out that, historically, law enforcement agencies were used to maintain current power arrangements. Examples include slave patrols, disruption of labor organizing and demonstrations, strike busting, interfering with civil rights, and so forth (Loewen,

2007; Zinn, 2003). Clearly, this is not consistent with Rawls' or Miller's principles of social justice.

### Courts

In courts, because of due process rights, every citizen has the right to trial, as well as other constitutional protections that are supposed to be upheld in an adversarial process whereby prosecutors and defense attorneys represent different actors in a battle to determine the truth (Neubauer, 2007). Due process is clearly part of Rawls' "equal liberties" principle as well as Miller's "equality" principle. Further, efforts are made – e.g., through sentencing guidelines – to produce fair sentences based on legal variables such as offense seriousness and prior record, which is also consistent with Miller's conception of "equality" (Walker, 2005). Finally, there are clearly measures in place to protect the weak – e.g., indigent defense – and this is consistent with Rawls' "difference principle" (National Association of Criminal Defense Lawyers, 2008).

However, there is unequal access to *quality* defense representation in criminal cases. For example, those that can afford private attorneys are less likely to sit in jail awaiting trial and are less likely to be incarcerated upon conviction (Bureau of Justice Statistics, 2008), suggesting that the ability to pay for private defense protection does lead to differential outcomes. This is not consistent with Rawls' "equal liberties" or Miller's "equality principle." It is also a threat to Rawls' "difference principle" because access to quality defense representation is not arranged for the benefit of the least advantaged.

Quality of defense can be considered incompatible with Miller's principle of "desert" for some clients do not have their case adequately defended based merely on their inability to pay. Wrongful convictions, caused mostly by overzealousness on the part of police and prosecutors, as well as faulty eye-witness testimony, are obviously inconsistent with the concept of "desert"

(Bell, Clow, and Ricciardelli, 2008). This is true for two reasons: first, no one deserves to be punished for acts they did not commit; second, when wrongful conviction occurs, the factually guilty do not receive the punishment they rightly deserve; they are also free to commit further crimes, causing even more harm to society.

The imbalance of power in the courts that exists in America is also not consistent with the values on which the court system was supposedly founded – due process and “innocent until proven guilty.” Currently, the prosecution has much more power than the defense as evidenced by more employees and a much larger budget nationwide. This threatens the ability of defendants to seek and obtain meaningful trials, which necessitates plea bargaining (Walker, 2005). Research shows that plea bargaining occurs for two main reasons: first, the police make too many arrests; second, the courts receive only about 20% of all resources devoted to criminal justice, meaning they do not have enough resources to justify having a trial for every one accused of even serious crimes.

The very practice of plea bargaining is not consistent with due process (Fisher, 2003), and thus is not compatible with Rawls’ “equal liberties” principles. In essence, the right to a criminal trial is more myth than fact. Plea bargaining is also inconsistent with Miller’s “equality principle” since plea bargaining is much more likely to occur with poor clients who are not well represented by quality defense attorneys (Padfield, 2009).

Plea bargaining also tends not to assign punishments that achieve proper “desert” of guilty criminals. Further, plea bargaining leads to too much punishment for those who are innocent but plead guilty anyway (Siegel, 2005). Walker (2005) shows that both “conservatives” and “liberals” do not like plea bargaining because it satisfies neither the requirements of punitive justice or procedural justice.

When trials (rarely) happen, they are plagued by serious threats to principles of social justice. For example, the “voir dire” process routinely results in African Americans being excused from jury service through the use of peremptory challenges (Walker, Spohn, and Delone, 2007). This is a significant threat to equal treatment, due process, and even “desert” (if defendants are convicted in part due to the racial composition of a jury). Research by the Capital Jury Project shows just how important the racial make-up of juries is for outcomes such as conviction and sentencing, even in death penalty cases where someone’s life is literally at stake (Brewer, 2004).

The practice of mandatory sentencing is consistent with Miller’s principle of “desert” when it is utilized for the worst offenders (who thus deserve the worst punishment). However, mandatory sentencing is inconsistent with the notion of desert when it is used against relatively harmless criminals who do not deserve such punishment based on the small amount of harm they cause to society. For example, “three strikes” laws have generally been used against non-violent offenders, leading to life imprisonment sentences. Meanwhile, white-collar and corporate offenders rarely are punished at all, even when serious injury or death results (Robinson, 2009). Three strikes laws have also been applied in a racially discriminatory manner, thereby threatening Miller’s “equality” principle (Macallair and Males, 1999; Brown and Jolivet, 2005; Rand, 2005).

### Corrections

In corrections, inmates are classified based on various criteria including their personal needs, inmates are provided care by facilities, and to some degree they are offered educational and vocational opportunities (Clear, Cole, and Reisig, 2008). This is all consistent with Rawls’ “difference principle” and Miller’s conception of “need.” Further, the protection of inmates’

First, Fourth, Fifth, Sixth, and Eighth Amendment rights is also consistent with social justice (American Civil Liberties Union, 2008).

Yet, the limited educational and vocational opportunities available to inmates can be considered a threat to the “needs” of inmates (Ross and Richards, 2002). Additionally, any and all unequal application of sanctions in America is a threat to Rawls’ and Miller’s principles of “equal liberties,” “equal opportunity,” “equality,” “desert,” and the “difference principle.” Recall that the practices of criminal justice institutions should respect the civil liberties of all citizens, should be applied in an equal fashion, should be based on desert, and should be arranged to the benefits of the least advantaged.

The poor and people of color are disproportionately likely to be exposed to probation, jail, prison, and executions (Barak, Leighton, and Flavin, 2006). To the degree that this is not due to disparate criminality of these groups, it is not consistent with social justice. For example, African American men tend to commit roughly half the murders and robberies in the United States in any given year. In 2006, they accounted for 51% of those arrested for murder and 56% of those arrested for robbery (Sourcebook of Criminal Justice Statistics, 2008). While some use these data to suggest that African Americans are thus more dangerous than whites (New Century Foundation, 2005), murder is but one form of culpable killing and robbery is but one form of taking property. If one were to focus on all forms of culpable killing and property taking behaviors, the vast majority of offenders would be white, for the vast majority of white-collar and corporate offenders are white (Robinson, 2009). Thus, the disproportionate focus on African American offenders owes itself to the fact that criminal justice agencies are aimed at pursuing only certain types of criminals (the street crime variety), and this is inconsistent with the concept

of desert that is key to social justice (Lynch, McGurrin, and Fenwick, 2004; Ross and Rothe, 2007; Rothe and Friedrichs, 2006)

The harsh conditions of prison – commonly referred to as the “pains of imprisonment” – (Sykes and Western, 2007) are also a threat to social justice. While incarceration is supposed to achieve the goal of incapacitation for the protection of society, imprisonment entails much more than mere removal of one’s freedom. Inmates are routinely subjected to violence, sexual harassment and assault, and similar negative treatments by both other inmates and guards (Jones and Pratt, 2008; Wolff et al., 2007; Wolff et al., 2007b). This is not consistent with the notion of “desert.” Further, it may in the long term result in conditions in society upon inmate release that cause further harm to citizens, something that is also not consistent with social justice.

## CONCLUSION

In this paper, I laid out the main theories of social justice of John Rawls and David Miller. I then briefly identified the ways in which American criminal justice agencies help realize as well as interfere with achieving social justice. When evaluating criminal justice practice against the social justice theories of Rawls and Miller, we see that the ideals of American criminal justice are consistent with social justice while many actual practices of criminal justice agencies make achieving social justice impossible. That is, there is a significant gap between the ideals of criminal justice in the United States and the realities of criminal justice practice.

Of course, American criminal justice agencies may or may not even be about social justice (Arrigo, 1998). That is, one reason our “criminal justice system” may not achieve social justice is that it is not even aimed at doing so. This should change. In my opinion, criminal justice agencies should be set up to help achieve social justice, and should also be evaluated for

their efforts to do so. This claim is based on the fact that citizens actually hold dear the principles of social justice laid out by Rawls and Miller (Miller, 2003).

Given that people actually hold values consistent with social justice, it logically follows that they would not agree to many of our criminal justice practices if they were aware of them. That is, if we defined our criminal justice policies behind a “veil of ignorance” and blind to our own personal preferences, the problems we see in criminal justice practice today would not be present because they threaten our social justice values, as laid out in our criminal justice ideals.



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